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In the Supreme Court of the United States

OCTOBER TERM, 1982

THE MIAMI CONSERVANCY DISTRICT, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DIRK D. SNEL
KATHLEEN P. DEWEY
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

QUESTION PRESENTED

Whether the court of appeals properly reversed in part the district court's determination that the entire Great Miami River system was nonnavigable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 692 F.2d 447. The district court's opinion (Pet. App. 11a-27a) is reported at 507 F. Supp. 924.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1982. A petition for rehearing was denied on January 11, 1983 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on March 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 11, 1979, the division engineer of the Ohio River Division of the Army Corps of Engineers determined that the Great Miami River and certain of its tributaries, located in southwestern Ohio, were navigable waters of the

United States (Pet. 3). On May 31, 1979, the division engineer wrote a letter to petitioner, the Miami Conservancy District ("District"), informing the District that the Corps was exercising jurisdiction over these waters pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403.¹ The Corps' determination of navigability was based on historical use of the waters prior to 1830.

2. The District then sued the Secretary of the Army, the Chief of Engineers, and two other Corps officials in the United States District Court for the Southern District of Ohio. The District sought declaratory and injunctive relief to restrain the Corps from exercising regulatory jurisdiction over the waters pursuant to Section 10 of the Act.

At trial, the District presented testimony by two historians, Dr. Carl Becker and Stephen Germann. Relying mainly on secondary sources (Tr. 29, 114),² Dr. Becker recounted sixteen "instances" of river traffic between 1805 and 1830 (Tr. 55-56). These boats carried farm produce, such as flour (Tr. 65). Closer questioning revealed that these "instances" lumped together all traffic using the river in a given month (Tr. 67-68). Thus, Becker explained that during the sixteen "instances" of river traffic, approximately 176 boats navigated the river in a 27 span (Tr. 80-81).³ In his research, Becker relied primarily upon a three-volume history of southwestern Ohio written by William Smith (Tr. 29, 120-121), who wrote that flatboats were a practical means of moving freight down the Miami River and that by 1826, in times of high water, 100 flatboats navigated the

¹This statute is set out at Pet. App. 30a.

²"Tr." refers to the transcript of proceedings in the district court.

³Becker also stated that a merchant named Hough used the river 14 times between 1808 and 1819 (Tr. 117). These expeditions were not included in Dr. Becker's figures, however, because the precise year for each of the 14 voyages was not available (*ibid.*).

Great Miami and 30 used the Little Miami, with average loads of 250 barrels; commerce, according to Smith, totaled \$1 million annually (Tr. 122).⁴

Dr. Becker testified that in his opinion the river was not navigable (Tr. 75). He based his opinion on the danger involved in using the river, on the fact that the river was used mainly during the spring months, and on his comparison of river traffic before 1830 with traffic on the Miami-Erie Canal after 1830 (Tr. 69-74, 76). Becker admitted that there had been regular boat traffic on the river but he did not consider the river navigable in a way which led to "real economic growth" (Tr. 123, 124).

Stephen Germann also admitted that there had been boat traffic on the river before 1830, but he thought the river was not navigable because it was not used to transport a large amount of commerce (Tr. 145, 154-155). On cross-examination, Germann stated that the river had first been used by Indians and fur traders in the customary mode of trade and travel (Tr. 163-164), and later to ship farm produce in interstate commerce to New Orleans (Tr. 157-158).

The Corps presented two witnesses at trial, Joan H. Fabe, an historical geographer (Tr. 173-174), and Dr. Leland Johnson, an historian employed by the Corps (Tr. 246). Mrs. Fabe testified that before 1800 the Indians in the area used the Great Miami River as "their I-75" (Tr. 188). The early European settlers also used the river for trade purposes (Tr. 189-191). During this period, the area was heavily forested and the major means of transportation was by water (Tr. 178-179). The roads that existed were very poor and were plagued by potholes and highwaymen (Tr. 179-181). In the course of a year, parts of the river could become

⁴When questioned about the accuracy of that statement, Dr. Becker responded: "I would not quarrel with those figures, except the 250 barrels" (Tr. 122).

dry, but the river was useable during some parts of every year (Tr. 176, 203-204). For her source material, Mrs. Fabe relied upon primary sources — letters and reports from travelers and the military (Tr. 218-219). In Mrs. Fabe's opinion, the use of the river was in keeping with the customary mode of travel for that time period (Tr. 215).

Dr. Johnson agreed that the river was used in interstate commerce in the customary mode of travel for the time (Tr. 282). Indians and French fur traders had used the river (Tr. 250-254). After the Indians were forced to leave the area in 1795, the white settlers began using the river to transport farm produce to New Orleans (Tr. 256-257). The first trip was reported in 1800 and voyages continued until 1828, when the Miami-Erie Canal was built (Tr. 257). In researching the use of the river, Johnson examined the records of the port of New Orleans (Tr. 260). In 1826, 130 flatboats were reported to have navigated the river (Tr. 275). Johnson concluded that the traffic on the river was not irregular, as the District's witnesses claimed, but rather was regular on an annual basis (Tr. 302).

At the conclusion of the trial, the district court ruled that neither the Great Miami River nor any of its tributaries was navigable (Pet. App. 11a-27a). The court acknowledged that the river had been used by Indians and by fur traders (*id.* at 14a). Although the court found that flatboats "were used to float cargo down the Great Miami River to the Ohio and then down the Ohio and the Mississippi to New Orleans" (*id.* at 15a-16a), it concluded that flatboat use during the period was "at best sporadic, limited to periods of high water, and only on a seasonal basis" (*id.* at 16a). The court also ruled that navigation by keelboats, steamboats, and tow boats was minimal and insignificant (*id.* at 16a-18a). The court relied upon the use of the Miami-Erie Canal

after 1830 to bolster its conclusion that the Miami River was not navigable either before or after 1830 (*id.* at 19a-20a, 25a).

3. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-10a). The court held that the evidence at trial established, as a matter of law, that the Great Miami River was navigable from its mouth to Mile 117 but that the Corps had failed to prove that the remainder of the river or that any of its tributaries was navigable (*id.* at 6a-8a). In support of its ruling of partial navigability, the court cited the evidence at trial that "[f]leets containing as many as seventy-nine and one hundred thirty flatboats were sighted on the Great Miami River" (*id.* at 6a). Viewing the entire record, the court of appeals concluded that the Great Miami River "afforded predictable albeit not always dependable use during spring high water fluctuations" (Pet. App. 7a).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant further review.

1. Petitioner contends (Pet. 6-8) that the court of appeals erred in setting aside in part the district court's ruling of nonnavigability without expressly asserting that the district court's findings were "clearly erroneous," pursuant to Fed. R. Civ. P. 52(a). The court of appeals' opinion, however, amply reflects its determination that certain of the district court's findings were clearly erroneous. The court of appeals stated that it agreed with the Corps that the district court had erred, and that the "factual findings do not present an accurate picture of the trial evidence" (Pet. App. 6a). The court also remarked that "the record establishes inescapably that the Great Miami was navigable * * *" (*id.* at

7a) and that "the evidence compels the finding" of navigability (*id.* at 9a). Thus, it is obvious that the court of appeals' decision rests in part on its belief that clear error had occurred.

As this Court stated in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court * * * is left with the definite and firm conviction that a mistake has been committed." Here, the court of appeals set aside the district court's finding that flatboat travel was "at best sporadic, limited to periods of highwater" (Pet. App. 6a). After reviewing the facts found by the district court the court of appeals ruled, in light of the record as a whole, that at times large fleets had used the river, in the customary mode of travel, as a "commercial highway to float goods from southwestern Ohio to New Orleans" (*id.* at 7a). The court therefore concluded that because this evidence met the applicable criteria for navigability, the river was navigable as a matter of law (*id.* at 6a, 9a).

Petitioner further contends (Pet. 7-8) that the district court's determination rested upon an assessment of the witnesses' credibility, and, accordingly, the court of appeals' reversal of that determination was improper. In *United States v. United States Gypsum Co.*, *supra*, however, this Court reversed the finding of the district court "[d]espite the opportunity of the trial court to appraise the credibility of the witnesses * * *." 333 U.S. at 396. Moreover, the evidence relied upon by the court of appeals came not only from the Corps' witnesses, but from petitioner's own witnesses. Both Dr. Becker (Tr. 80-81) and Mr. Germann (Tr. 145-146) agreed that in 1825 or 1826, a fleet of 79 flatboats navigated the Great Miami River. The district court included this fleet in its own findings of fact (Pet. App. 16a). In addition, Becker testified that from 1800 to 1827,

approximately 176 boats navigated the River (Tr. 80-81). He did not disagree with the statement of one historian that by 1826 as many as 130 boats used the river (Tr. 122). These were two of the figures relied upon by the court of appeals in ruling that the district court's findings were clearly erroneous (Pet. App. 6a).

Petitioner's argument is without merit for the additional reason that the determination of navigability is not a pure question of fact, but rather is a mixed question of law and fact. Thus, in considering a dispute over navigability where the evidence was uncontroverted, this Court declared, in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404 (1940), that "[b]oth the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied."

It is well established that mixed questions of law and fact are not reviewed under the clearly erroneous standard. In *Pullman Standard, Inc. v. Swint*, 456 U.S. 273 (1982), the Court recently reiterated that the "clearly erroneous" rule applies to questions of pure fact. *Id.* at 287-290. The Court made clear, however, that that rule does not necessarily apply to mixed questions of law and fact, which it described as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Id.* at 289 n.19. The issue of navigability fits within this description. Thus, the district court's conclusion that the Great Miami River was not navigable (Pet. App. 24a-27a) was a mixed question of law and fact upon which the court of appeals properly made its own independent determination.

2. Petitioner acknowledges (Pet. 9) that the court of appeals correctly described the law of navigability as developed by this Court, but it contends that the court "then

elected not to follow that law." This contention is without merit.⁵

After reviewing this Court's decisions on navigability, the court of appeals summarized the test for navigability as follows (Pet. App. 6a):

A navigable waterway of the United States must (1) be or have been (2) used or susceptible of use (3) in the customary modes of trade and travel on water (4) as a highway for interstate commerce.

Accord, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). The court then ruled that the evidence at trial established navigability of parts of the Great Miami River under this test.

Petitioner contends (Pet. 11) that because use of the river was at "at best sporadic, limited to periods of high water, and only on a seasonal basis" (Pet. App. 16a), the river must be held to be non-navigable. This contention ignores this Court's observation in *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921), that "the navigation [need not] be open at all seasons of the year, or at all stages of the water." Contrary to petitioner's contention (Pet. 12), seasonal fluctuations in water level are not the same as temporary periods of high water. The evidence at trial showed that each spring the water level of the Great Miami River rose sufficiently to support some boat traffic

⁵Petitioner initially asserts (Pet. 9) that the court of appeals erred in following the holding of the court in *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), interpreting the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et. seq.* ("Clean Water Act"), rather than applying Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403. This statement is disingenuous. While the court of appeals mentioned *NRDC v. Callaway* and the Clean Water Act, it did so merely to provide an explanatory background for the Corps' decision to re-examine the navigability of the Great Miami River and its tributaries (Pet. App. 3a).

(Tr. 76, 123, 145). Petitioner's two witnesses agreed that regular boat traffic transported farm produce down the river (Tr. 123, 145). The fact that transportation on the river might have been dangerous or difficult does not detract from navigability. *United States v. Appalachian Electric Power Co.*, *supra*, 311 U.S. at 408-409; *Economy Light & Power Co. v. United States*, *supra*, 256 U.S. at 122. There is no assertion in the record that the canoes used by the Indians or the flatboats used by later inhabitants were not the customary modes of travel for their day (Tr. 122, 164), or that the boats did not travel in interstate commerce (Tr. 157). See Pet. App. 15a-16a. The evidence presented at trial, even if confined only to the testimony of petitioner's witnesses, shows that the river was navigable.⁶

3. Petitioner urges this Court to reject or severely restrict the doctrine of "indelible navigability" (Pet. 12-13). There is no reason to do so. Under this doctrine, "[w]hen once found to be navigable, a waterway remains so." *United States v.*

⁶The district court's conclusion of nonnavigability relied in large part on its finding that the construction of the Miami-Erie Canal in 1830 increased commerce and water travel. This occurrence "overshadows everything," according to the district court (Tr. 129). See also Pet. App. 19a-20a. As the court of appeals correctly ruled, however, the fact that the canal was a better waterway might mean that it was more navigable than the river but "[i]t says nothing about the navigability of the River in absolute terms. The existence and use of the Canal after 1830 does not rebut proof of the River's navigability before 1830" (*id.* at 7a). The district court also used the lack of commerce by keelboats, steamboats and tow boats to support its findings (Pet. App. 16a-18a). But in *Economy Light & Power Co. v. United States*, *supra*, 256 U.S. at 122-123, this Court stated:

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. * * * If it be capable in its natural state of being used for purposes of commerce no matter in what mode the commerce may be conducted, it is navigable in fact and becomes in law a public river or highway.

Appalachian Electric Power Co., *supra*, 311 U.S. at 408. This salutary rule ensures stability. Should it be rejected or limited, the courts would be deluged with suits during periods of drought or whenever a condition caused a waterway to lose its ability to support traffic, however temporarily. As this Court observed in *Economy Light & Power Co. v. United States*, *supra*, 256 U.S. at 123-124:

The [Rivers and Harbors][A]ct in terms applies to "any * * * navigable river, or other navigable water of the United States"; and, without doing violence to its manifest purpose, we cannot limit its prohibition to such navigable waters as * * * now are * * * actually open for use.

4. Finally, petitioner makes what is essentially a political argument (Pet. 14-15), asking this Court to release it from what it considers to be the burdens of federal regulation. This plea rests, not on whether the Great Miami River is navigable, but on what petitioner perceives to be the appropriate regulatory balance between the federal government on the one hand, and state and local governments on the other. That argument is best pressed in the political arena and not in the courts. See *Economy Light & Power Co. v. United States*, *supra*, 256 U.S. at 124 ("If [streams no longer navigable] are to be abandoned, it is for Congress, not the courts, so to declare.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

Solicitor General

CAROL E. DINKINS

Assistant Attorney General

DIRK D. SNEL

KATHLEEN P. DEWEY

Attorneys

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